No. 10,381

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. BUTLER, et al.,
Appellants,

vs.

GRACE APPLETON MCKEY,
Appellee.

APPELLANTS' REPLY TO APPELLEE'S PETITION FOR A REHEARING.

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

THIS COURT DID NOT HOLD THAT CALIFORNIA LAW RATHER THAN FEDERAL LAW GOVERNS THE QUESTION WHETHER DEFECTS IN THE MODE OF PROOF RELATING TO THE PUBLICATION OF SUMMONS RENDER A FEDERAL JUDGMENT VOID.

(1) This Court cited Rule 4 (d) (7) of the Federal Rules of Civil Procedure as applicable to the manner in which service upon an individual can be accomplished. There is no federal statute relating to service by publication so that in this case the man-

ner of service was governed by the California statute, to-wit: Section 412 of the California Code of Civil Procedure.

(2) Where a plaintiff's affidavit for publication of service is in any manner defective, the question still remains whether the judgment based on such service is a "nullity" or whether it is good as against collateral attack.

This Court's opinion does not expressly refer to the doctrine that the nullity of a federal judgment is a federal question which is governed by federal law and precedents.

Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797;

United States v. Mayer, 235 U. S. 55, 69, 59 L. ed. 129, 136;

Note 182 in 28 *U. S. C. A.,* Sec. 724,

which authorities are quoted and discussed in appellants' opening brief on pages 13 and 14 and in appellants' reply brief on page 4.

The obvious reason why the Court did not discuss the above doctrine is that the California precedents and the federal precedents are to the same effect, to-wit: That under both lines of precedents, state as well as federal, hearsay contained in an affidavit for publication of service does not make the judgment a nullity and open to collateral attack.

The Court's opinion (after discussing the California cases on the power of the Courts to vacate judgments upon collateral attack) refers to the federal authorities, to-wit:

(a) *Thompson v. Thompson,* 226 U. S. 551, 556, 57 L. ed. 347, involving a situation closely analogous in which the U. S. Supreme Court upheld a judgment based on publication of service *where the affidavit was made wholly on information and belief,* and the Court said that even if the Virginia law would not sanction such affidavit the judgment would not be a nullity where *the affidavit was defective "not in omitting to state a material fact, but in the mode of stating it or in the degree of proof".* (Italics ours.)

(b) *Pennoyer v. Neff,* 95 U. S. 714, 24 L. ed. 565, where the U. S. Supreme Court disagreed with the trial Court because the trial Court had said that an affidavit for publication of service which was defective in the mode of proof made the judgment void on its face. The wording of the affidavit in the case of *Pennoyer v. Neff,* supra, is quoted on pages 21 and 22 of appellants' opening brief.

The significance of the holding of the U. S. Supreme Court in *Thompson v. Thompson,* supra, is well illustrated by the following cases cited by the U. S. Supreme Court in the *Thompson* case:

Belmont v. Cornen, 82 N. Y. 256;

Pettiford v. Zoellner, 45 Mich. 358, 362, 8 N. W. 57.

(c) *Marx v. Ebner,* 180 U. S. 314, where the U. S. Supreme Court looked to the proof furnished by the marshal's return as well as to plaintiff's affidavit under a statute practically identical with the California statute.

(d) Appellee's argument that a perjury charge could not be sustained against affiant was refuted and discussed in this Court's decision in the case of *Cohen v. Portland Lodge, No. 142, B. P. O. E.* (C. C. A. 9), 152 Fed. 357, which is likewise cited in the opinion.

(3) The petitioner in his petition for a rehearing does not even mention the foregoing three decisions of the United States Supreme Court set forth in the opinion of this Court.

Upon search of petitioner's brief in support of his petition we find only two short remarks therein relating to, though by no means explaining or justifying, this remarkable neglect.

On page 3 of her brief, petitioner says:

> "We believe that the opinion of this court is plainly in error in the following particular:
> (1) After determining *that the law of this state as to publication of summons governs,* it adopts as the law applicable with reference to the hearsay affidavit, upon which the order for publication of summons was predicated, two decisions of the Supreme Court of California. * * *" (Italics ours.)

On page 27 of her brief, at the outset of her "conclusion" petitioner states:

> "We have given no consideration to the court's discussion of the Federal authorities applying the rule in other states, for the reason that *under the rule California law applies* and the California legislature and the California courts have spoken definitely upon the subject." (Italics ours.)

Petitioner does not make it clear which rule is referred to where she says that "under the rule" California law applies. On page 3 of her brief she correctly states that the Court determined that California law governs "as to publication of summons".

Although this Court discussed at length federal authorities, it evidently did not occur to the petitioner that the Court did so because it relied upon such federal precedents to justify its decision. The reasons are evident, to-wit:

(a) That the law, directing how service shall be made is not identical with the law concerning the validity of judgments;

(b) That in this case the attack was directed against a federal judgment the validity of which depends on federal law and precedents, even though the mode of service by publication was governed by local law;

(c) That defects of an affidavit for publication of service concerning the mode of proof rather than the statement of facts necessary for publication of service are not considered as sufficient by the United States Supreme Court to render a judgment void upon collateral attack;

(d) That the marshal's certificate was considered by the United States Supreme Court in a case concerning an identical statute, as proof supporting the judgment.

Petitioner's failure to cite or include in her argument the three U. S. Supreme Court decisions relied

on by this Court, speaks for itself. Her silence concerning these federal authorities cited in this Court's opinion demonstrates *that she recognizes the soundness of the Court's reasoning in that the judgment cannot be vacated upon her collateral attack if federal precedents are applicable to the question whether this federal judgment is a nullity.*

II.

THE LAW OF CALIFORNIA IS TO THE SAME EFFECT AS THE FEDERAL PRECEDENTS, TO WIT, THAT DEFECTS IN AN AFFIDAVIT FOR PUBLICATION OF SERVICE AS TO THE MODE OF PROOF DO NOT MAKE THE JUDGMENT BASED ON SUCH SERVICE VOID AND OPEN TO COLLATERAL ATTACK.

This Court, after having referred in its opinion to Section 412 of the California Code of Civil Procedure, discusses the question what effect the California decisions have given to hearsay statements in an affidavit in support of an order for publication of summons. If the California law has been construed by the California authorities that either an affidavit containing hearsay statements is good as against direct attack upon the judgment or that it is good as against collateral attack upon the judgment, it must be said that the service is not even defective under the local law and that therefore the second question is not decisive to-wit; that where the proof for publication of service is defective under the local law, such defect does not render the judgment void under federal authorities.

In discussing the California law, this Court makes a clear and definite distinction between the direct attack upon a judgment and collateral attack stating that a motion to vacate a judgment made after the expiration of the statutory period is a collateral attack in California under the authority of the case of *City of Salinas v. Luke Kow Lee,* 217 Cal. 252 at page 255, and the other cases cited in that decision.

This Court cites one of the several California cases, *Forbes v. Hyde,* 31 Cal. 342, 348, which clearly draw the marked distinction between the examination of an affidavit upon direct attack as distinguished from a collateral attack, and then refers also to the case of *Ligare v. California Southern Railroad Co.*, 76 Cal. 610 at page 613, where the ruling in *Forbes v. Hyde,* supra, was expressly followed.

Petitioner criticizes the reference made by this Court to *Forbes v. Hyde,* supra. This criticism (on pages 11, et seq. of her brief) is exclusively devoted to the facts of *Forbes v. Hyde,* and expresses petitioner's opinion on the question whether the Court in the case of *Forbes v. Hyde,* supra, had before it an affidavit which was better legal evidence than Herrington's affidavit. However, *Forbes v. Hyde* was merely cited by this Court as representative of the legal principle that the California Courts draw a vital distinction between the examination of the proof submitted for service by publication upon a collateral attack as compared to the examination of such proof upon direct attack. It would therefore be completely idle to follow petitioner's argument on the facts of

Forbes v. Hyde. Petitioner entirely overlooks the fact that the California Courts have restated the same principle in the case of *City of Salinas v. Luke Kow Lee,* supra, at pages 255 and 256, and *Kaufmann v. California Mining, etc. Syndicate,* 16 Cal. (2d) 90 at pages 92 and 93, and that the rule in California that the recitals in a judgment as to due service are binding upon collateral attack (see *City of Salinas,* supra, at page 256 and the *Kaufmann* case at page 93) is identical with the rule that hearsay statements in an affidavit are not fatal to the judgment upon collateral attack. (See our citations from California cases on pages 31, et seq. of appellants' opening brief, and 26 et seq. of appellants' reply brief.) We particularly refer to the discussion of the case of *Ligare v. California S. R. R. Co.,* supra, on page 36 of our opening brief wherein we have shown that Herrington's affidavit would under all circumstances have been upheld by the California Court upon collateral attack.

This Court in emphasizing the distinction made under California law between the examination of the proof for publication of service upon direct attack on the one hand and collateral attack on the other hand refers to the difference in the requirements as to hearsay in the case of *Kahn v. Matthai,* 115 Cal. 689 as compared with the case of *Rue v. Quinn,* 137 Cal. 651.

In the *Rue* case the Court expressly distinguished *Kahn v. Matthai,* supra, on the ground that the *Kahn* case contained a ruling upon direct attack.

Petitioner thinks that this Court was in error in adopting the *Rue v. Quinn* decision as the California law, because this Court in its opinion mentions that "perhaps", in the case of *Columbia Screw Company v. Warner Lock Co.,* 138 Cal. 445, the California Court applied the same standards of examination as in the *Kahn* case, so that since *Rue v. Quinn,* supra, was decided six months prior to the *Columbia Screw Company* case the holding in *Rue v. Quinn,* supra, was overruled by the California Court. There is a fundamental error involved in petitioner's reasoning which is revealed by referring to the fact that the *Columbia Screw Co.* case was a case of direct attack on a judgment. The opinion in that case commences with the following sentence: "This appeal is from a default judgment". We would have much to say with regard to this case, if it would be at all within the scope of our present inquiry which is only concerned with collateral attack on a judgment. As the *Columbia Screw Co.* case did not relate to the law laid down in the case of *Rue v. Quinn,* supra, we follow this Court's line of reasoning that it is beyond the issues of this case whether the *Columbia Screw* case is comparable to the ruling in *Kahn v. Matthai* or not.

That the rule in *Rue v. Quinn* has never been overruled in California is clearly witnessed by the cases of *City of Salinas v. Luke Kow Lee,* supra, at page 256, and *Kaufmann v. California Mining Syndicate,* supra, at page 91, where the Court in the case of a collateral attack said (August, 1940):

> "The ordinary rules governing a direct attack upon a judgment have no bearing under the circumstances. (Musser v. Fitting, 26 Cal. page 746; Rue v. Quinn, 137 Cal. 651.)"

Part of petitioner's brief is devoted to a discussion of her theory on the ruling in *Rue v. Quinn,* which is expressed on page 11 of petitioner's brief as follows:

> "The Court, in Rue v. Quinn, did not even insinuate that an order based upon an affidavit which as to every material point was hearsay was not void and could not be attacked collaterally."

The Court said in *Rue v. Quinn,* at page 657:

> "The objections that the facts stated in the affidavit are only hearsay, and that the inquiries of the affiant were limited to persons in the county of San Diego, were proper to be considered by the judge when an application for the order was made, for the purpose of determining whether sufficient diligence had been employed to ascertain if the defendant could be found within the state; but these facts do not justify a disregard of his conclusion or render his order void."

We believe that this citation where the Court proceeds under the assumption of an affidavit where the facts stated "are only hearsay" should make it entirely clear that petitioner's theory on *Rue v. Quinn,* is not supported by the case. We also refer to the fact that the California doctrine on the binding force of the recital of due service in the judgment upon

collateral attack necessarily covers hearsay features in the proof for publication of service. (*City of Salinas v. Lee,* supra, at page 256; *Kaufmann v. California Mining Syndicate,* supra, at page 93, and *Hahn v. Kelly,* 34 Cal. 391, 431, which case was followed and quoted in the *Kaufmann* case.)

In referring to *Cohn v. Portland Lodge,* supra, this Court met petitioner's argument that a perjury charge could not have been predicated on Herrington's affidavit. It is therefore immaterial whether this Court's decision in *Cohn v. Portland Lodge,* supra, referred to the California law or to the identical Oregon law since the same argument could be made under both laws and be answered by the same reasons which are set forth in the case of *Cohn v. Portland Lodge,* supra.

III.

THIS COURT FINDS THAT HERRINGTON'S AFFIDAVIT WAS NOT ENTIRELY FOUNDED UPON HEARSAY AND THAT THE MARSHAL'S RETURN WAS REFERRED TO IN THE AFFIDAVIT AND INCORPORATED IN THE SAME AND THAT THE MARSHAL'S CERTIFICATE WAS ALSO BEFORE THE COURT AND CARRIED WEIGHT AS EVIDENCE.

California and federal precedents alike are to the effect that the marshal's return can be referred to in an affidavit and made a part thereof and that the marshal's certificate is admissible evidence for an order of publication of service. The Federal and California authorities cited on page 22 of our reply brief are passed over in silence by petitioner.

Herrington's statement that he and the other attorneys for appellants made diligent search for the defendant and made inquiries of each and every person whom they could expect to be able to give information as to the whereabouts of said defendant and that he and the other attorneys did not know the present whereabouts of the defendant and could not learn her present whereabouts was certainly not subject to criticism as hearsay and is referred to in the Court's opinion as being not subject to petitioner's objections against hearsay statements.

That this statement was independent and not part of Herrington's statements on Leo K. Gold's reports is discussed on pages 38 et seq. of appellants' reply brief. We also refer to Herrington's statement in his affidavit on the inquiries which he made of a law firm in Los Angeles. (Tr. pp. 55 and 56.)

Petitioner claims that the trial judge and appellants' attorneys agree with her in her interpretation of Herrington's affidavit. (Petitioner's Brief p. 18.)

The trial judge rendered his decision without opinion so that his reasons are unknown. He may even have relied on one of the grounds of attack which petitioner later dropped.

Where petitioner claims that the undersigned attorneys have placed the same interpretation on Herrington's affidavit that she does, she misreads the passage quoted on page 18 of her brief. This passage is contained in the statement of the case on page 5 of our opening brief and is concerned with the fact that two attempts to serve process were made. The

first by the United States Marshal, and the second by Leo K. Gold, who had been appointed process server by the Court. It is stated that first the United States Marshal after diligent search was unable to find defendant and returned the subpoena unserved, and that then Gold was appointed, and that he was "also unable to serve process upon appellee". The word "thereupon" following this sentence shows that appellee did not move for publication of summons until not only the marshal but also Gold had failed to serve process.

The whole statement cited by petitioner is not concerned with the question what kind of search was made in order to locate defendant; the fact was merely stated that Gold's attempt to serve process had failed. Herrington's inquiries were therefore not a matter within the scope of that statement.

IV.

THE JUDGMENT IS NOT VOID FOR THE REASONS CONTENDED BY PETITIONER THAT APPELLANTS FAILED TO ESTABLISH BY AFFIDAVIT THAT NO CERTIFICATE OF RESIDENCE WAS FILED BY APPELLEE IN SAN FRANCISCO.

Herrington states in his affidavit upon information and belief that no certificate of residence had been filed by defendant (appellee) or on her behalf in the City and County of San Francisco.

(1) We have searched petitioner's brief in order to find the material allegation that such certificate had been filed. Petitioner in her motion to vacate the

judgment never made such an allegation and nor does she now make any allegation to that effect. In other words, the fact is that no such certificate was filed and that Herrington's affidavit that such certificate was not filed was absolutely correct.

The Courts, Federal and California Courts alike, have made it clear that the first concern of the Court with a motion to vacate a judgment is to determine whether the facts necessary for a publication of judgment were present—if those facts were present and only the proof thereof is by any means defective, the Courts have deemed this latter fact immaterial upon collateral attack.

See *Thompson v. Thompson,* supra and the cases cited therein.

So far as California cases are concerned, the Court established the same principle in *Herman v. Santee,* 103 Cal. 519, and reiterated the same in the cases of *City of Salinas v. Luke Kow Lee,* supra, and *Kaufmann v. Mining Syndicate,* supra.

In *Herman v. Santee,* supra, at page 523 the Court quoting *In re Newman,* 75 Cal. 220 said:

> "It is the fact of service which gives the court jurisdiction, not the proof of service * * *" (after referring to an amended affidavit):
>
> "None of the facts stated in the affidavit are controverted, and it must be held, therefore, that from the time of the service the court acquired jurisdiction of the parties to the action."

We also cite from *City of Salinas v. Luke Kow Lee,* supra at page 254 referring to an amended affidavit

of publication citing the right facts and correcting the incorrect statements in the original affidavit:

> "It was well within the province of the court below to permit the filing of such amended affidavit of publication * * * for it is now well settled, that it is the fact of service and not the proof of service which determines the validity or invalidity of a judgment."

(2) In the instant case publication of service was granted on two independent grounds, to-wit, that defendant (appellee) after due diligence could not be found within the state and for the distinct and separate ground that the defendant (appellee) was concealing herself to avoid service of summons. (Tr. p. 60.)

As to the second ground Section 412 of the California Code of Civil Procedure clearly does not require the affidavit to state that a certificate of residence had not been filed. (*Davis v. Ramont,* 66 Cal. App. 778, 781; *City of Salinas v. Luke Kow Lee,* supra at p. 257, expressly distinguishing *McPhail v. Nunes,* 38 Cal. App. 557, the case cited by petitioner.)

(3) Turning to *McPhail v. Nunes,* 38 Cal. App. 557, the sole authority relied on by the petitioner, we find the facts underlying that case to be that service by publication was obtained on the ground that defendant after due diligence could not be found within the state and that in the affidavit for publication of service there was no statement of any character as to whether a certificate of residence had been filed. In

the *McPhail* case, the judgment was attacked upon two grounds:

(a) That the affidavit for publication of service was fatally defective because the facts stated therein were mere ultimate facts alleged solely upon information and belief.

(b) That the affidavit entirely omitted to state facts with respect to the filing of a certificate of residence.

The Court held that for the second reason to wit: the plaintiff's failure to make any statement concerning the filing of a certificate of residence, the judgment was subject to reversal upon defendant's appeal. There is no word contained in the decision that a statement on information and belief in the affidavit concerning the filing of a certificate of residence would have been insufficient to support the judgment.

(4) Petitioner fails to set forth any authority or reason why a hearsay statement in an affidavit of this type concerning the filing of a certificate of residence should have other effect upon the judgment upon collateral attack than another hearsay feature in the same affidavit.

(5) We submit, that the fact that a certificate of residence had *not* been filed, as distinguished from the opposite fact, can obviously only be stated upon information and belief of the affiant. No sensible affiant can state this negative fact affirmatively. The mere fact that upon searching the records or requesting information from the keeper of the record a certificate

of residence did not appear to be filed, does not entitle the affiant to affirmatively state the negative that such certificate, has not been filed. There is always the possibility that it was mislaid or misfiled so that affiant's statement must be limited to his conclusion upon information and belief.

The doctrine on the proof of negative facts in California was expressed in the case of

Russell v. McDowell, 83 Cal. 70, 81,

as follows:

> "Moreover, it is to be considered that the contestant was assuming the difficult task of proving a negative * * * and the doctrine is well established that slight proofs make out a prima facie case where a negative is to be proved."

See also *Hamilton v. Pacific Electric Railway Co.,* 12 Cal. (2d) 598, 603, expressly following the *Russell* case.

Petitioner cites the familiar doctrine that when the existence of an alleged fact (for instance that a foreign corporation is duly authorized to transact business in the state) can be ascertained from an inspection of a public record its existence shall not be put in issue by a denial based solely upon information and belief. (*Art Metal Constr. Co. v. Anderson,* 182 Cal. 29, *Home Owner's Loan Corporation v. Gordon,* 36 Cal. App. (2d) 189.) This doctrine is concerned with a fact which exists outside of the record and for which proof can be found in a record. In the instant case we are concerned with the status of the record itself and not with any fact outside of the record. The

sole matter to be stated is whether or not a certificate of residence has been made part of the record so that the statement upon information and belief can only relate to the record itself. In other words, the requirement that the statement should refer to the public record is complied with by Herrington's statement dealing with the filing or non-filing of a document. Clearly, the question how to prove the negative that a certificate was not filed presents an independent and different problem as to which it must be concluded that the necessary leniency of the Courts with regard to the proof of negatives relates to the proof of a negative concerning a public record as well as to all other types of negatives.

(6) It is hardly necessary to add that petitioner is estopped from amending her motion by now urging a new ground for the alleged nullity of the judgment since appellants cannot now amend their proof as to the fact that a certificate of residence was never filed. It would be an easy way to overcome the right of the plaintiffs (appellants) to amend their proof (discussed on pages 25 et seq. of appellants' opening brief and on pages 45 et seq. of their reply brief) if defendant (appellee) was privileged in spite of the prejudice to the appellants arising therefrom to now urge new points which she had neglected to urge at any prior stage of the matter.

V.

THE PETITIONER DOES NOT ATTACK THE JUDGMENT IN SO FAR AS THE PUBLICATION OF SERVICE WAS BASED ON THE FACT THAT THE PETITIONER WAS CONCEALING HERSELF TO AVOID SERVICE.

We refer to pages 48, et seq. of appellants' reply brief, where we demonstrated that the District Court's exercise of its discretion that Herrington's affidavit proved that appellee concealed herself to avoid service, cannot be disturbed.

VI.

THE MARSHAL'S CERTIFICATE IS ADMISSIBLE EVIDENCE FOR AN ORDER OF PUBLICATION OF SERVICE.

There was no particular reason for the Court to enter into a discussion of the California practice on this point beyond its reference to the federal cases of *Marx v. Ebner,* supra, and to its own decision in the case of *Cohen v. Portland Lodge,* supra.

California authorities which are to the same effect are collected on page 24, et seq. of appellants' reply brief.

VII.

THIS COURT'S OPINION IS NOT CONCERNED WITH A COMPREHENSIVE COLLECTION OF ALL REASONS WHY APPELLEE'S COLLATERAL ATTACK ON THE JUDGMENT MUST FAIL NOR WITH AN EXHAUSTING ENUMERATION OF ALL CALIFORNIA AUTHORITIES.

It is obvious that this Court to justify its decision relied on a few leading principles which were entirely

sufficient to sustain its ruling and that upon entering the subject of California law this Court determined the principles applicable and cited representative decisions bringing out most clearly these principles. However, petitioner labors under a wrong assumption in assuming that the nullity of the judgment can be shown by discussion of factual elements contained in the one or the other of the authorities cited by the Court. This Court, evidently, chose the California decisions which it cited for the language which expressed the legal principles to which this Court looked in reaching its decision.

CONCLUSION.

We submit that petitioner has failed to show any reasons why a rehearing should be granted and therefore her petition should be denied.

Dated, San Francisco,
October 18, 1943.

Respectfully submitted,
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